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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Petitioner,

vs.

UNITED AIR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

The Civil Aeronautics Board, under the Federal Aviation Act of 1958, approved the merger of Capital Airlines into respondent United Air Lines, subject to certain labor protective provisions, including arbitration, for the protection of all employees involved in the merger, whether organized or unorganized. Petitioner labor organization, a participant in the merger proceedings, represented certain employees of Capital who were functionally integrated into the larger comparable group of United employees, part of whom were represented by a different labor organization

under separate labor agreement with United. The Civil Aeronautics Board declined to condition approval of the merger on United's assuming the labor agreement petitioner had with Capital, and directed that United proceed to give notice under the labor protective provisions to the Capital employees who would be affected by the loss of representation and labor agreement.

The questions are:

1. Whether under these circumstances either the entire Capital labor agreement or its arbitration provisions are binding on United after the merger.

2. Whether under these circumstances and in light of the Railway Labor Act there is federal jurisdiction, aside from judicial review of the Civil Aeronautics Board merger order, over an action to declare United bound by the Capital labor agreement.

STATUTES INVOLVED.

Involved are Section 408(b) of the Federal Aviation Act of 1958, 72 Stat. 767, 49 U. S. C. § 1378(b); Section 2, Fourth, Ninth and Eleventh, and Section 204 of the Railway Labor Act, 48 Stat. 1187-88, 64 Stat. 1238, 45 U. S. C. §§ 152, 184; Sections 9(a) and 301(a) of the Labor Management Relations Act, 61 Stat. 143, 156, 29 U. S. C. §§ 159 (a), 185(a). The Railway Labor Act provisions, other than Section 2, Eleventh, are set out in an appendix to the Memorandum of the United States as Amicus Curiae. Relevant portions of Section 2, Eleventh and of the other statutory references are set out in an appendix to this brief.

STATEMENT.

This case arises out of the merger of Capital Airlines into respondent United on June 1, 1961. This merger—like all in the air transport industry—was subject to approval by the Civil Aeronautics Board ("C. A. B.") under the provisions of the Federal Aviation Act of 1958 (49 U. S. C. §§ 1301-1542). The order of the C. A. B. approving the merger (33 C. A. B. 307; R. 57) was affirmed by the Court of Appeals on January 25, 1962. *Northwest Airlines* v. *C. A. B.*, 303 F. 2d 395 (C. A. D. C., 1962).

Capital was in serious financial difficulty and bankruptcy was the alternative to merger. The merger was an "emergency crash measure." "Capital is financially *in extremis* and will not survive if the merger is disapproved." 303 F. 2d 395, 397, 398.

Among the factors of concern to the C. A. B. was the impact on Capital's 7,600 employees. The Examiner had found that the merger would protect their jobs and welfare. 33 C. A. B. at 402. The C. A. B. rejected alternative proposals to the merger on the ground that the employees of Capital—among other interests—"have too much at stake to permit this Board to gamble with the future of Capital's system." 33 C. A. B. at 308.

United had advised the C. A. B. that it intended to offer employment to each of Capital's employees at wages and under terms and conditions equal or superior to those enjoyed while employed at Capital. However, United recognized that the C. A. B. would not be satisfied with such general assurances, and agreed to accept labor protective provisions imposed by the C. A. B. as a condition to approval of the merger. 33 C. A. B. at 323; R. 126. These labor protective provisions are imposed by the C. A. B. under the broad authority of Section 408(b) of the Federal

Aviation Act of 1958 (49 U. S. C. § 1378(b)) to condition approval of mergers upon such terms and conditions as it should find to be just and reasonable. See *United States* v. *Lowden*, 308 U. S. 225 (1939).

The labor protective provisions imposed upon United included protection for pay, seniority, pensions and other benefits, dismissal allowances, reimbursement for certain losses and expenses in connection with moving, the requirement for notice and meetings in the event of any proposed changes to be effected by the merger, and ultimate arbitration to resolve any disputes arising under the protective provisions. 33 C. A. B. at 342-47; R. 59-68. The C. A. B. order also retained jurisdiction to make modifications, amendments or additions to the labor protective provisions. R. 59.

The basis for United's assurance to the C. A. B. that the wages and terms and conditions of Capital employees would be equal or superior after the merger was that these Capital employees would come under United's applicable collective bargaining agreements, or under United's uniform personnel regulations if no collective bargaining agreement was applicable at United, and that the wages and other benefits under these agreements and regulations were generally superior to those at Capital. 33 C. A. B. at 362-63. R. 48, 52-53. Another factor was that United intended functionally to integrate operations immediately after the merger, and it would have been impossible to plan and operate efficiently if employees working side by side and performing the same duties were to receive different rates of pay and be subject to different working conditions depending upon whether they were United or Capital employees prior to the merger. R. 48.

The C. A. B. was advised of United's position regarding the integration of Capital employees early in the merger proceedings. The consequence of this position was that

none of the six Capital labor agreements would survive the merger. Although a number of labor organizations participated in the merger proceeding, including many who held labor agreements with Capital, only petitioner Brotherhood objected to United's position and requested the C. A. B. to require United to assume its contract with Capital as a condition of the merger.[1] R. 48-49.

The C. A. B. refused to impose the Brotherhood-Capital agreement on United. Rather, in a statement which recognized that the agreement would not survive, it held that the matter should be handled under its labor protective provisions. The C. A. B. said:

> "It would seem that this matter, on which the examiner did not comment, is one of the matters which should appropriately arise under section 11 [of the labor protective provisions]. That is to say, Capital and United should jointly or severally give at least forty-five days' notice to the *employees who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement.* This would then place the matter as a problem to be worked out between the companies and employees, in accordance with regular procedures applicable to the matter of representation and agreement." 33 C. A. B. at 330-31; R. 49. (Emphasis added.)

Section 11 of the labor protective provisions required the posting of 45 days notice of any change to be effected by the merger, provided for meetings if requested by any employee or authorized representative to settle problems of rearrangement of the employees arising out of the merger, and for arbitration under the labor protective provisions in the event any problem remained unsettled. R. 67-68.

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1. The Brotherhood was the only one of the labor organizations that had no agreement with United; hence it was the only one faced with the loss of collective bargaining status.

The notice required by the C. A. B. was posted by United and Capital. R. 54-56. The Brotherhood thereupon petitioned the C. A. B. for reconsideration of its order in light of this notice, and again asked the C. A. B. to require United to assume the Capital-Brotherhood labor contract. The C. A. B. denied this petition. C. A. B. Order No. E-16802.

The Brotherhood then petitioned the Court of Appeals for the District of Columbia to review the order of the C. A. B. insofar as it refused to impose on United its labor agreement with Capital, and refused to accept certain suggested modifications of the labor protective provisions (C. A. D. C., Case No. 16,360). After denial by the Court of its motion to stay the merger, the Brotherhood again petitioned the C. A. B. for a partial stay of the order approving the merger, and requested the C. A. B. to require United to treat with the Brotherhood as the representative of the employees Brotherhood represented at Capital. The Board denied this petition. C. A. B. Order No. E-16929.

The Brotherhood's petition to review the C. A. B. merger order in the Court of Appeals was consolidated with those of Northwest Airlines, Delta Air Lines and Eastern Air Lines. After requests for extension of time and indefinite postponement in the Court of Appeals, the Brotherhood withdrew its petition on November 6, 1961. R. 50.

Three days later, on November 9, 1961, this action was initiated by the Brotherhood in the district court for the Southern District of Ohio, by the filing of a complaint seeking a declaration that United was bound to the terms of the Brotherhood-Capital labor agreement, and to enjoin United from refusing to apply that agreement to "employees of Capital covered by that agreement who became employees of United upon the consummation of the merger." R. 3-11.

United moved to dismiss the complaint or for summary judgment. The grounds for this motion were: the cause involved a dispute as to who were the representatives under the Railway Labor Act of certain of its employees and hence exclusive jurisdiction lay with the National Mediation Board; if the requested relief were granted United would be required to treat with a bargaining representative for a minority of a craft or class, contrary to the provisions of the Railway Labor Act; the Brotherhood-Capital agreement revealed on its face that it could not legally or practically be applied to less than an entire craft or class; another labor organization had representation rights for part of the group upon which the Brotherhood was seeking to impose its agreement with Capital and hence this other labor organization was an indispensable party to the action. R. 45-47.

The District Court granted United's motion to dismiss, finding in its Order that "this Court is without jurisdiction over the subject matter for the reason that the same relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of the defendant * * * and that exclusive jurisdiction of said dispute is vested with the National Mediation Board. * * *" R. 129.

The Court of Appeals affirmed, relying primarily on the decision of this Court in *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323 (1943). R. 131.

The facts upon which the Court of Appeals based its determination were set out in affidavits filed by United in support of its motion, and are not in dispute.

The classification of employees which the Brotherhood represented at Capital was known as the craft or class of clerical, office, stores, fleet and passenger service employees, sometimes referred to as the clerical craft or class. The Brotherhood had been certified as the collective representa-

tive of this craft or class at Capital pursuant to a National Mediation Board ("N. M. B.") election held in 1947. Capital maintained collective bargaining relations with the Brotherhood continuously from the time of its certification until the United-Capital merger. R. 102.

The Capital-Brotherhood agreement recited the 1947 N. M. B. election and certification of the Brotherhood as the basis for its recognition by Capital as the "sole and exclusive bargaining agent for all employees" of Capital in the clerical craft or class. (Agreement, Article I(a); R. 23-24.)

Immediately prior to the merger there were approximately 2,700 employees at Capital in the clerical craft or class represented by the Brotherhood as sole and exclusive bargaining agent. The comparable group at United numbered approximately 10,000; the United group had never been organized into a single craft or class as had been the case at Capital. However, part of this group—the cargo clerks and handlers and stockroom attendants—were separately organized as the result of a 1945 N. M. B. election. These two classifications, now known as the ramp and stores employees, have been represented by the International Association of Machinists since 1948 and are now under a single collective bargaining agreement between United and the IAM known as the "Ramp and Stores Agreement." R. 50-51, 71.

Immediately prior to the merger, 2,200 of the 10,000 employees of United in the grouping comparable to the clerical craft at Capital were under this IAM Ramp and Stores Agreement. The remaining approximately 7,800 employees were not represented by a labor organization and were covered under United's personnel regulations. R. 51.

Upon the consummation of the merger, the former Capital employees performing work covered under the

United-IAM Ramp and Stores Agreement came under that contract. Consequently, about 530 of the 2,700 former Capital employees who were represented by the Brotherhood at Capital are now represented by the IAM at United. Letters of Agreement relating to the integration of United and Capital employees under the Ramp and Stores Agreement were entered into between United and the IAM on June 23, 1961. R. 51, 93. All these employees are now members of the IAM. R. 124.

The remaining 2,170 former Capital employees who were represented by the Brotherhood at Capital and who are not under a collective bargaining agreement at United have been integrated into United's system and are now working side by side with the 7,800 unorganized United employees in the same job classifications. All are subject to the same pay schedules, benefits and working conditions established under United's uniform personnel regulations. R. 51-52. All were offered employment with United. R. 126.

The result has been an improvement in the pay and related benefits of these employees. The overall wage scales at United at this time were higher than those which existed at Capital prior to the merger. The maximum vacation for the employees at Capital under the Brotherhood agreement was three weeks per year after 12 years of service—a level reached at United after ten years, where the maximum vacation is 20 days per year. At Capital these employees paid for the entire cost of their uniforms; United paid one-half of the initial cost. United offered these employees a stock purchase plan in which it matches 15% of the employee contribution; Capital had no such plan. United paid one-half of the cost of accident and sickness insurance for these employees; Capital paid none. They received $5,000 of free group life insurance from United and the option to purchase additional life insurance to $10,000; Capital offered them an option to purchase

$7,000 of insurance and provided none free. These employees became eligible to participate in United's retirement income plan which provides more liberal benefits than were available at Capital. In addition, these former Capital employees were given full seniority credit for all prior service with Capital.[2] R. 52.

Two weeks after the district court issued its opinion dismissing the complaint for lack of jurisdiction, Brotherhood filed its application with the N. M. B. under Section 2, Ninth of the Railway Labor Act seeking representation rights for the same craft or class it had represented at Capital, with certain exceptions. A dispute developed between the IAM and the Brotherhood over their respective interests, and subsequently United filed a suit to restrain the N. M. B. from proceeding with an election on the Brotherhood application unless it accorded United status as a party in interest on the issue of the appropriateness of the craft or class and unless the N. M. B. would use a ballot which would allow employees the alternative of voting for no representation. United's complaint was dismissed, and it appealed this dismissal. (C. A. D. C., No. 17,777.) After the dismissal of United's complaint, a group of affected employees brought a similar suit and were granted an injunction against the N. M. B. using a ballot which provided no space for a vote against representation, and the N. M. B. and intervenor Brotherhood, in turn, appealed this decision. (C. A. D. C., Nos. 18,068, 18,072.) These appeals were consolidated and the Court of Appeals affirmed all orders of the District Court. *United Air Lines v. National Mediation Board*, 330 F. 2d 853 (C. A. D. C., 1964). Petitions for writs of certiorari of United, the Brotherhood, and the N. M. B. are now pending. Oct. Term 1964, Nos. 138, 139 and 369.

2. Additional benefits are described in the Initial Decision of the C. A. B. Examiner. 33 C. A. B. at 362-63.

SUMMARY OF ARGUMENT.

The Court of Appeals affirmed the district court's dismissal of the complaint on the ground that the underlying dispute involved a question of representation over which there is no judicial jurisdiction. Petitioner Brotherhood and amicus United States contend that there was jurisdiction, and that *Wiley* v. *Livingston*, 376 U. S. 543 (1964), is dispositive, although they disagree on the relief which that case requires. The Brotherhood argues that its labor agreement with Capital should be binding on United; the United States argues that the system board of adjustment established by that agreement should determine whether and to what extent United is bound by the agreement.

United's motion to dismiss or for summary judgment raised the substantive contention that the agreement did not survive as a matter of contract or law in addition to the jurisdictional point.

I.

The *Wiley* case is distinguishable from the present case in many respects, and a consideration of these differences compels the conclusion that even if there was judicial jurisdiction to consider the substantive issues, neither the Brotherhood agreement in its entirety nor any of its provisions survived the United-Capital merger.

The Brotherhood labor agreement by its terms could not be applied to less than an entire craft or class of employees. Its successor clause did not require that it be binding in case of a merger, but only that negotiations be held to determine the protection to be afforded the employees involved. United did not assume the Brotherhood labor agreement through the merger agreement with Capital.

A. The United-Capital merger—like all airline mergers—was subject to approval by the Civil Aeronautics Board

under the Federal Aviation Act. The Brotherhood participated in the C. A. B. hearings. The C. A. B., as a condition of approval of the merger, imposed labor protective provisions on United for the benefit of all the employees involved relating to such conditions as seniority integration, protection of wage levels, pensions and similar benefits, and provided arbitration machinery to resolve any disagreements. The rationale of *Wiley*—which was to give employees some protection against sudden change in the employment relationship—has no application to a regulated merger of this character. This purpose was served by the C. A. B. conditions.

B. The wages and other conditions of employment at United were superior to those at Capital. Consequently the former Capital employees gained through the loss of the collective bargaining agreement. There is, therefore, no specific issue to submit to arbitration under the adjustment board procedures, and none is claimed in the complaint. The defect is not one of pleading but of substance, and the suggestion of the United States that the Court direct arbitration has no referent, since no arbitrable issues have been identified. Since the Brotherhood has never identified any claims it may have had on behalf of the employees, it has abandoned any right it may have had to arbitration.

C. The merger of two airlines is different in kind than the merger of two publishing firms as in *Wiley*. The United-Capital merger was one of a functional—not merely corporate—integration from the outset, and such an integration could not be accomplished between two airlines if employees performing the same work, side by side, were subject to different wages and working conditions depending on the irrelevant fact of whether they were United or Capital employees before the merger.

II.

A. It has been judicially determined that questions of representation arising under the Railway Labor Act are not justiciable even though they may also involve questions of validity of contract. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *General Committee* v. *M.-K.-T.*, 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific*, 320 U. S. 338 (1943).

Here the International Association of Machinists claimed bargaining rights over a substantial number of the employees Brotherhood represented at Capital, and upon the effectuation of the merger these employees came under the collective bargaining agreement the IAM had with United. Thus there was an underlying "jurisdictional dispute" with respect to these employees.

The Brotherhood's effort to disavow these employees in its argument—although not in its complaint—is self-defeating, since then it is in effect changing the labor agreement it had with Capital, and this requires it to assert representation rights which it lost when it lost its majority status on consummation of the merger. The amicus memorandum appears to recognize this dilemma, makes no concession to the claims of the IAM, and implies that this may be one of the problems to be submitted to the adjustment board under the Capital-Brotherhood contract. However, this contractual adjustment board was a bipartite board on which only the Brotherhood, not IAM, was represented, there being no national board comparable to the National Railroad Adjustment Board under Title II of the Railway Labor Act.

There was also a dispute as to the identity of the former Capital employees for whom Brotherhood may speak in any event, since approximately 1,150 of the 2,700 employees

Brotherhood represented at Capital became members of Brotherhood under the provisions of a union security agreement between Capital and Brotherhood—an agreement which would violate the Railway Labor Act if enforcement was attempted after the merger.

The pending proceedings before the N. M. B. for representation of an entire craft or class of present United employees made overt what was implicit from the beginning of this litigation—that the underlying dispute involved questions of representation for which there is to be no judicial intervention. Accordingly the decision below was correct.

B. *Wiley* was an action to compel arbitration under Section 301(a) of the Labor Management Relations Act, and it has been judicially determined that federal jurisdiction under that section is not limited to majority representatives. There is no comparable provision in the Railway Labor Act, which is applicable to majority representatives only. Section 204 of the Railway Labor Act, upon which the amicus United States bases federal jurisdiction, is specifically limited to majority representatives. Hence, since Brotherhood no longer claims to represent a majority of the craft or class, there is no basis for federal jurisdiction.

C. The C. A. B. declined to require United to assume the Brotherhood-Capital contract as a condition to approval of the merger, as requested by the Brotherhood. Instead the C. A. B. directed United to give notice to all employees "who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement." The Brotherhood then petitioned the Court of Appeals for the District of Columbia to review the C. A. B. order, raising the same issues raised in this proceeding. The question of the survival of any of the Capital labor

agreements was closely related to other issues in the merger, including the welfare of the Capital employees, and the anticipated savings of the amount of Capital's annual deficit to be realized by consolidation of facilities and personnel at overlapping stations of the two companies. The effect of the Brotherhood-Capital agreement after the merger cannot be considered in isolation from all the other factors leading to approval of the merger. These issues could have been decided by the Court of Appeals for the District of Columbia on Brotherhood's petition to review the C. A. B. order. However, Brotherhood withdrew from that proceeding and three days later started this action. The Court of Appeals subsequently upheld the C. A. B. order on petition of other airlines on January 25, 1962. In addition to the other jurisdictional grounds presented, the Court should hold that jurisdiction is not appropriate in this proceeding since the matter should have been left for determination by the Court of Appeals on petition to review the C. A. B. order on the entire record of the merger proceedings.

ARGUMENT.

United's motion in the district court was in the alternative; that the district court lacked jurisdiction, and that, in any event, the Brotherhood agreement did not survive the United-Capital merger as a matter of law or contract.

In the first section of this Argument we shall demonstrate that the contract did not survive by its terms, nor was it assumed by United, and that there is no overriding federal policy requiring that the contract or its arbitration provisions be binding on United under the circumstances present here. In the second section we shall argue that this action was not justiciable because the underlying dispute was a question of representation under the Railway Labor Act with respect to which there is no judicial jurisdiction, and hence the Court of Appeals was correct in affirming the dismissal; that in any event there is no federal jurisdiction because the Railway Labor Act—the statute under which federal jurisdiction is claimed in this case—applies only to majority collective bargaining representatives, a status the Brotherhood lost on the effectuation of the merger; and finally that there was no original jurisdiction in the district court for the further reason that the issues raised in this proceeding were before the Court of Appeals for the District of Columbia on the Brotherhood's petition to review the C. A. B. order approving the United-Capital merger, and should have been left for determination by that Court.

I.

THE BROTHERHOOD-CAPITAL AGREEMENT DID NOT SURVIVE THE UNITED-CAPITAL MERGER.

The Brotherhood-Capital Agreement was negotiated and entered into on the assumption that Brotherhood would continue to be the "sole and exclusive bargaining agent for all employees in the [clerical] craft or class . . . of the Company." Agreement, Art. I(a), R. 23-24. Its terms and conditions can only be rationalized on that assumption. When this premise fell with the merger of Capital into United, the entire contract fell.

Unless the Brotherhood were the majority representative, the union security agreement it contained (R. 37) would be unlawful. Section 2, Eleventh, of the Railway Labor Act, authorizing such an agreement, clearly contemplates that it shall apply only where the union represents all employees in the craft or class. Provisions such as posting of seniority rosters, displacement rights, preference bidding, transfers and promotions, are meaningful only when applied to all employees similarly situated. Thus, the provisions of the contract show that it was designed only to cover an entire craft or class, not a fraction of a bargaining unit.

Petitioner relies heavily on Article 1(b) which provides that "All provisions of this Agreement shall be binding upon the successors or assigns of the Company" (R. 24), and the National Mediation Board interpretation that this "means just what it says." R. 44. But petitioner glosses over the full significance of the balance of the sentence in which the "successors and assigns" language appears and what the N. M. B. said about that. The sentence continues, "and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety days prior to

such consolidation, or merger, and representatives of the Company and Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved." R. 24. The N. M. B. said that this language meant that Brotherhood and Capital "were obligated to meet and treat on specified subjects." R. 45. Thus the agreement does not simply provide—as the Brotherhood would have it—that it was binding in the event of a merger.

What it contemplated was that in the event of a succession in which Capital might remain intact—such as a sale of Capital as a unit without physical integration into another airline, or a change in corporate name or structure—where the basic employing unit would retain its identity, then the agreement would be binding. But where other employees must be considered—as in a consolidation or merger—then the agreement contemplated and provided for "negotiation for the procedure to be followed and protection to be afforded."

Petitioner says Capital never gave it the ninety day notice required by the above-quoted clause. Pet. Br. 5. Yet on November 28, 1960, three months after the merger agreement and six months before the effective date of the merger, Capital and the Brotherhood did meet for the very purpose of complying with this provision. Capital offered to negotiate and asked the Brotherhood for its proposals. The Brotherhood refused to submit any, and never pursued the grievance or arbitration provisions of the agreement to redress any complaint it may have had with respect to Capital's conduct under this provision or to the meaning of the provision. R. 103-5. Brotherhood here seeks to convert a contractual obligation to negotiate which Capital had before the merger to an agreement that all terms of the contract would be binding on United after

the merger. The contract does not support this construction.

United did not voluntarily bind itself to the Brotherhood agreement. The Brotherhood suggests that under the terms of the merger agreement between Capital and United, United assumed the Brotherhood contract. Pet. Br. 2, 19.

The merger agreement did not state that United would assume the Capital labor agreements, and the most that could be contended by Brotherhood is that the merger agreement may have been ambiguous in this respect. But United made its position clear before the C. A. B. long before the merger was consummated.[3] There was no dissent from Capital, the other party to the merger agreement. "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered." Williston on Contracts, Rev. Ed., Vol. 3, § 623. Brotherhood was certainly not misled about United's intention or the effect of the merger agreement, for it requested the C. A. B. to impose its contract on United "since the merger agreement makes no provision for the continued operation of the Brotherhood-Capital agreement." 33 C. A. B. at 393.

The argument of petitioner and amicus United States is that all these factors were considered in *Wiley* v. *Livingston*, 376 U. S. 543 (1964); and that that decision is determinative of this case. However, they are not in agreement over the reach of that decision or of what disposition it requires of this case. The Brotherhood considers it as

3. The Court of Appeals found that United announced at the outset of the merger proceedings that it would not assume or be bound by any of Capital's labor agreements, that no contention was made that United intended to assume these agreements under the terms of the merger agreement, or that United ever made any representations that it would be bound. R. 133.

authority for the proposition that the entire Brotherhood-Capital agreement survived the United-Capital merger. Pet. Br. 17-18. The United States position is that only the arbitration procedures of that agreement continue viable and that other questions must be settled through that process. U. S. Mem. 11-12.[4]

Wiley held the "disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances present here, the successor employer may be required to arbitrate with the union under the agreement." 376 U. S. at 548.

The clear implication is that there may also be other circumstances in which it may not be appropriate to require arbitration. The implication is spelled out: "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." At 551.

There are, of course, similarities between *Wiley* and the present case. Both involve mergers. Both involve the integration of a smaller group of employees into a larger group. Both involve an existing collective bargaining agreement at the disappearing company at the time of merger. But there are significant differences which lead to the conclusion that although there may have been "im-

4. There appears to be the same difference of opinion between the Courts of Appeal for the Third and Ninth Circuits. *Cf. United Steelworkers* v. *Reliance Universal*, 56 LRRM 2721 (C.A. 3, July 8, 1964), and *Wackenhut Corp.* v. *United Plant Guards*, 332 F. 2d 954 (C.A. 9, 1964). In both cases a business was sold and continued intact. In *Wackenhut* the Court held the successor was bound by the pre-existing labor contract, including the obligation to arbitrate; in *Reliance* the Court held the obligation to arbitrate survived, not necessarily the entire labor agreement, and that an arbitrator could take into account the change in circumstances resulting from the transfer of ownership. Both relied on *Wiley*.

pressive policy considerations favoring arbitration" in *Wiley* which were "not wholly overborne by the fact that Wiley did not sign the contract" (376 U. S. at 550), these considerations are not present here.

The differences between the cases not only establish that *Wiley* is distinguishable but that a different result should be reached in the present case.

A. The Employee Protection Found Necessary in Wiley Was Satisfied by the C. A. B.

The *rationale* of *Wiley* is that since "employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership . . . the objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U. S. at 549.

But railroad and airline owners may not "independently rearrange their businesses." These rearrangements are subject to prior federal regulation by the Interstate Commerce Commission or the Civil Aeronautics Board. The peculiar public interest with which these vital transportation industries are affected long ago led these agencies to recognize the position of employees in railroad and airline mergers and to accord them full participation in the administrative proceedings and protection as a condition of approval.

In *United States* v. *Lowden*, 308 U. S. 225 (1939), the Court held that under the broad terms of Section 5(4)(b) of the Interstate Commerce Act authorizing the ICC to approve railroad consolidations under conditions it finds

to be just and reasonable, the Commission had the power to impose provisions for the protection of employees. The Court found that the mitigation of hardship on employees in consolidations was appropriately related to the maintenance of an adequate and efficient transportation system. 308 U. S. at 234.[5]

The power of the C. A. B. to impose labor protective provisions under the analogous provisions of Section 408(b) of the Federal Aviation Act has been upheld on the authority of the *Lowden* case. *Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211 (C. A. 9, 1952); *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C. A. 2, 1953).[6]

The labor protective provisions imposed by the C. A. B. in the United-Capital merger are set out at pages 59 to 68 of the Record. They provide for integration of seniority lists in a fair and equitable manner and arbitration in the event of failure to agree (Section 3); displacement allowance for a period of four years to any employee placed in a worse position with respect to compensation within three years of the merger (Section 4); dismissal allowance based on length of service to any employee deprived of employment as a result of the merger (Section 5);[7] protection "of benefits attaching to his previous employment, such as hospitalization, relief, and the like" (Section 6); moving, traveling and living expenses for employees and

5. The Interstate Commerce Act has since been amended to make specific provision for employee protection in consolidations. Section 5(2)(f), Interstate Commerce Act. This section has been construed as providing the minimal employee protection and not as a limitation on the authority of the ICC to provide conditions beyond its scope. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950).

6. These cases arose under the Civil Aeronautics Act, the antecedent statute to the Federal Aviation Act, under comparable statutory provisions.

7. Dismissal allowance is a standard C.A.B. protective provision. In this case, however, United offered employment to all former Capital employees. R. 126.

family required to change their residence as a result of the merger (Section 8); protection against loss in sale of home or unexpired lease as a result of change of place of residence because of the merger (Section 9); notice to employees of "proposed changes to be effected by the merger," meeting with employees or representatives on request to settle problems of rearrangement arising out of the merger, and arbitration of any unsettled problems (Section 11); arbitration of any dispute under the protective provisions (other than Section 9 which provides separate appraisal machinery for resolving valuation disputes) (Section 13).

These provisions are applicable to all employees, whether United or former Capital, and whether organized or unorganized. Section 11—under which the C. A. B. directed United to give notice of "change or loss of representation and collective bargaining agreement" (R. 49)—was first adopted by the C. A. B. in the *Delta-Chicago and Southern Merger Case*, 16 C. A. B. 647 (1952), for the express purpose of affording protection to the unorganized Delta employees. Id. at 655. In the United-Capital merger, the C. A. B. stated that Section 11 was applicable to organized and unorganized employees. 33 C. A. B. at 326-27.

Many unions participated in the United-Capital merger proceeding, including the Air Line Pilots Association, Air Line Stewards and Stewardesses Association, Air Line Dispatchers Association, Communication Workers of America, Flight Engineers International Association, International Association of Machinists and petitioner Brotherhood. The C. A. B. gave full consideration to their position concerning protection to be given employees affected by the merger. 33 C. A. B. at 323-31.

Accordingly, the policy of protecting the employees' interest which underlies the *Wiley* decision has been fully satisfied here. Here the merger was regulated, not inde-

pendent; the regulatory agency did protect the employees from the impact of a sudden change in the employment relationship; full arbitration over changes to be effected by the merger was provided; employees did participate in the proceedings leading to the imposition of this protection.

Thus, there is no reason to impose the Brotherhood agreement on United or the former Capital employees, and in fact to do so would not be in their interest.

B. Brotherhood Has Abandoned Its Right to Arbitrate.

The action in *Wiley* was to compel arbitration of specific issues. But the Court said, "... [W]e do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known." 376 U. S. at 551. Since it is the function of the Court not only to decide whether a company is bound to arbitrate but "what issues it must arbitrate" (id. at 546-47), the Court examined these issues to determine whether they were arbitrable. Id. at 552.

The complaint here did not request enforcement of arbitration; it asked that United be required to assume the Brotherhood-Capital agreement and apply it to all former Capital employees covered by its terms who became employees of United upon consummation of the merger.

The complaint does not allege that Brotherhood ever requested arbitration of any provision of that agreement. The only allegation approaching the subject is that "by refusing to accept and process grievances of former Capital employees . . . United has violated the provisions of Section 204 of the Railway Labor Act." R. 10. The complaint does not allege what grievances were refused or on what basis they were refused, nor does anything in the record fill that deficiency.

The absence of allegations concerning arbitration was

no pleading oversight. Rather, it dramatizes the abstract nature of the claim of the Brotherhood, which is all form and no substance. The fact is that there is nothing to arbitrate. The meat of industrial dispute and unrest is not here. The Capital employees gained, they did not lose, because United would not accept the Brotherhood agreement. They got higher wages, longer vacations, better pension benefits, more liberal accident and health insurance, free life insurance and dependency coverage. They have jobs, whereas before they faced imminent loss of employment through the anticipated bankruptcy of Capital. The C. A. B. protected their seniority and provided arbitration procedures in event of disagreement. That is why the Brotherhood raises no specific claims—but only a general plea that its contract be binding on United. If this relief were granted it is highly doubtful that any former Capital employees would view it as a victory.

The United States memorandum attempts to cure the defect in the complaint by suggesting that the Court give the Brotherhood relief for which it did not ask and require the Brotherhood and United to arbitrate under the Brotherhood-Capital agreement. U. S. Mem. 12.

But if no issues have been presented for arbitration to this point, then what shall the Court direct be arbitrated? Certainly the Brotherhood has not raised any specific issue in this case relating to any employee grievance. The employees are apparently satisfied with their improved working conditions, and in any event, had three years in which to protest under the labor protective provisions.[8] The only

8. The labor protective provisions even gave employees a degree of protection against arbitrary dismissal. They provide that a dismissal allowance would not be payable in the event of discharge for "justifiable cause." Sec. 5(c), (i)(5). R. 63, 64. Thus an employee who had been terminated allegedly for cause could contend under these provisions there had not been cause and that he was therefore entitled to a dismissal allowance, and pursue this complaint to arbitration under Section 13 of the labor protective provisions.

apparent grievance, and about the only interest not protected by the C. A. B., was the Brotherhood's loss of its status as collective bargaining agent and consequent loss of the union security agreement it had with Capital.

However, we doubt if the Brotherhood or the United States would suggest that United be required to arbitrate its failure to terminate former Capital employees who stopped paying dues to the Brotherhood, or whether employees hired after the merger would be required to join the Brotherhood as a condition of employment—both required under the Brotherhood agreement. R. 37. Enforcement of these provisions would be contrary to Section 2, Eleventh, of the Railway Labor Act, which restricts union security arrangements and checkoff to the majority representative of the craft or class.

At any time since February 1, 1962, United could have terminated the Brotherhood-Capital agreement on thirty days notice—as the amicus memorandum concedes. U. S. Mem. 9 fn. 4. If United had taken that course, or if it should do so now, how could United be required to arbitrate claims never identified prior to the termination of the agreement?

The United States argues that the arbitration is to deal with what is covered by the agreement or whether the agreement applies at all. But there is no point to arbitrating whether the agreement applies at all when no one would contend that all of its provisions should be applicable, and when neither the petitioner nor any employee has requested either that any particular provision be applied to any particular employee or that there be arbitration as to United's failure to give effect to any particular provision.

In November, 1960—one year before it filed the complaint in this action—Brotherhood and Capital met. The Brotherhood complained that Capital had not negotiated with it

before the merger application was filed. Capital responded that its obligation under Article I(b) of the contract was to meet ninety days before the merger—not before the merger application. Although requested by Capital, Brotherhood refused to submit any proposals for protection of the employees. R. 104-5. If Brotherhood was of the opinion at that time that Capital had violated their agreement, then it should have pursued that protest through the contractual grievance and system board procedures which were unquestionably in effect at that time.

Under the circumstances, it is clear that Brotherhood has no grievances to arbitrate, that if it has it has "fail[ed] to make its claims known," and, in any event, it has "abandon[ed] its right to arbitration." 376 U. S. at 551.

C. There Has Been a Substantial Change in the Employing Enterprise.

Another circumstance looked to by the Court in *Wiley* was the continuity of identity of the employing unit. ". . . There may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make the duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S. at 551.

In the year before the merger application, United had operating revenues of $314,050,000, operating earnings of $18,803,000 and flew 4,878,000,000 revenue passenger miles; Capital had operating revenues of $108,488,000—with a deficit of $1,757,425—and flew 1,613,000,000 revenue passenger-miles. 33 C. A. B. at 353. United served 60 cities, Capital 48, and 12 were common to both. After the merger, Capital simply disappeared. Its facilities and employees

were completely absorbed by United and integrated functionally into its system. R. 51-52.

A merger of this nature and magnitude is clearly different in kind from the merger of two publishing companies in the same city.[9]

The United-Capital merger was unique, since as the C. A. B. Examiner found, "for the first time a major air carrier finds itself insolvent and faced with a foreclosure of a creditor's lien on all its flight equipment." 33 C. A. B. at 402. It was also unique in that this was, to our knowledge, the first air line merger in which the systems were functionally integrated from the outset. This kind of integration was essential to reduce the Capital deficit. The elimination of duplicate facilities and personnel alone was estimated to result in an annual savings of $1,908,000, more than the 1959 Capital deficit. Capital had no turbo jet equipment and immediately upon consummation of the merger this service was introduced on the old Capital routes. 33 C. A. B. at 362-363, 400-1.

There was complete loss of identity of the Capital enterprise after the merger and not the "continuity of identity" found in *Wiley*.

Petitioner contends that in other airline mergers the surviving carrier assumed labor contracts of the disappearing company. Pet. Br. 27. The fact is that in airline mergers where the surviving carrier assumed collective bargaining agreements of disappearing carriers, the airlines could not be functionally integrated until these agree-

9. In *Piano Workers* v. *Kimball*, 332 F. 2d 761 (C.A. 7, 1964), a plant in a Chicago suburb was transferred to southern Indiana. The Court distinguished *Wiley* in that circumstance on the ground, inter alia, that the Wiley and Interscience plants were in the same city.

ments were cancelled, and until then the two merging carriers were operated as separate airlines. R 126.[10]

All the factors present here—the protection, including arbitration, accorded employees by the administrative proceeding, the lack of any tangible benefit to the employees involved, the abandonment of arbitration by petitioner, and the lack of substantial continuity of identity of Capital—are persuasive reasons why the Court should not impose any obligation on United arising out of the Brotherhood-Capital agreement, even if the Court should find there was jurisdiction over this action.[11]

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10. In the *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952), the Air Line Pilots Association asked the C.A.B. to condition the merger on the negotiation of a new contract with ALPA for the reason that it would be impossible to continue a merged operation under separate contracts. 15 C.A.B. at 719. ALPA was correct, since Braniff could not functionally merge until it cancelled the Mid-Continent contract. R. 126.

11. The minority status of the Brotherhood after the merger and the conflicting claims of the IAM for the ramp and stores employees formerly under the Brotherhood contract may also present issues going to the substantive question whether the contract could survive in any event as a matter of law under the Railway Labor Act. In a footnote in *W ley* (376 U.S. 543, 551 n.5) it was pointed out that there—unlike here—there was "no problem of conflict with another union" and that the minority status of the Interscience union after the merger presented no difficulty, citing *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17 (1962). But minority status under the Labor Management Relations Act is not the same as minority status under the Railway Labor Act. Since these issues go primarily to questions of jurisdiction, they are discussed under that heading in the following section of this Argument.

II.

THE COURT OF APPEALS WAS CORRECT IN FINDING THERE WAS NO JURISDICTION.

A. The Underlying Dispute Is Not Justiciable.

The Court of Appeals held that this case "involved a representation dispute and not merely an action sounding in contract," and accordingly affirmed the dismissal of the complaint by the district court. R. 139.

Neither the Court of Appeals nor the district court suggested that the National Mediation Board could determine, under Section 2, Ninth, of the Railway Labor Act, the question of the applicability of the Capital-Brotherhood agreement. What they did hold was that the underlying dispute involved questions of representation and conflicting union jurisdiction, and that these have been reserved for the N. M. B. The fact that the pleading was cast in contract terms was not sufficient to create jurisdiction.

Under the Railway Labor Act, the existence of contractual claims is not sufficient to vest the courts with jurisdiction if the basic dispute concerns "who is entitled to represent the craft, or who are members of it." *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205 (1944).

This appears clearly from the three leading cases on judicial review under the statute. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *General Committee* v. *M.-K.-T.*, 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific*, 320 U. S. 338 (1943).

In the *Switchmen's* case, the union argued that its bargaining unit of yardmen for a division of the New York Central could not be swallowed up in a unit of all yardmen because of its contract. It conceded that but for the contract the action of the N. M. B. in finding the system-wide

craft or class appropriate might be proper. The Court of Appeals discussed this issue fully. 135 F. 2d 785, 792 (C. A. D. C., 1943). But this Court held there was simply no judicial jurisdiction, despite the contract issue.

The two *General Committee* cases concerned disputes between the Brotherhood of Locomotive Engineers, representing the engineers, and the Brotherhood of Locomotive Firemen and Enginemen, representing the firemen. The disputes arose out of agreements which the Firemen had negotiated with the carriers concerning the promotion of firemen to engineer positions, which were inconsistent with the method worked out between the carriers and the engineers. The Engineers sued for declarations that the collective bargaining agreements of the Firemen were in violation of the Railway Labor Act, on the theory that the agreements interfered with the Engineers' rights as exclusive bargaining representative for its craft or class.

Again the Court held that the courts were without jurisdiction to consider the action, although plainly here the suits went to the "validity of contract."

In the first *General Committee* case the Court pointed out that controversies could arise with respect to which there was neither an administrative nor judicial remedy. (320 U. S. at 336-37):

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * * However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. * * * If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. * * *

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. * * * Courts should not rush in where Congress has not chosen to tread."

The Court did find jurisdiction, in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 (1944), to review a contract which discriminated among members of a craft or class on racial grounds. *Switchmen's* and *General Committee* were distinguished (323 U. S. at 204-5):

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act * * * or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration * * *. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board." (Citing *Switchmen's Union* and the *General Committee* cases.)

A recent decision of the Court of Appeals for the Fourth Circuit, *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (C. A. 4, 1962), cert. denied 369 U. S. 885 (1962), discussed the "validity of contract" theory in connection with a dispute arising out of the merger of the Virginian Railway and the Norfolk & Western Railroad. There the Interstate Commerce Commission, which has authority to approve railroad mergers, had left to the bargaining representatives the integration of seniority of

the affected employees. The telegraphers of each railroad were represented by the Order of Railroad Telegraphers—Division 13 of the ORT representing the Virginian telegraphers, and Division 14, ORT representing the Norfolk & Western telegraphers. The two Divisions were unable to agree on an integration plan, and the national president of the ORT then entered into a collective bargaining agreement with the merged railroad, compromising the positions of each of the Divisions. Division 14 then brought suit to enjoin the railroad from acting under this agreement, relying on the union constitution and the provisions of the collective bargaining agreement between Division 14 and the Norfolk & Western relating to seniority rights of men on newly acquired lines. In holding that it lacked jurisdiction to reach the merits of the controversy, the Court stated:

> ". . . [I]n view of the General Committee cases, the conclusion is inescapable that district courts have no such authority where 'validity' of the contract depends upon the merits of a representation dispute." 298 F. 2d at 20.

Hence if there is here a "jurisdictional dispute," a question of "who is entitled to represent the craft" or "who are members of it" (*Steele*, 323 U. S. at 205), then there is no jurisdiction even though the complaint may claim that "validity of contract" is the issue.

The complaint requests that United be enjoined from "continuing its refusal" to apply the Brotherhood-Capital agreement "to employees of Capital covered by that agreement who became employees of United upon the consummation of the merger." R. 11. The International Association of Machinists claims that 530 of these 2,700 employees are under its contract, and states it has no intention of giving up this claim (R. 124-125)—despite the

statement of its general counsel that "IAM has no interest and no desire to be a party to the litigation." (R. 122.)

Brotherhood attempts to avoid this obvious jurisdictional conflict by arguing that this "is a controversy which United has created in order to defeat the rights of all the employees involved." Pet. Br. 34. This controversy was not created by United. Brotherhood knew long before the merger was effectuated that the IAM claimed jurisdiction over some of the Capital employees then under contract with Brotherhood. The IAM participated in the merger proceedings before the C. A. B. and one of its representatives testified concerning these employees:

> ". . . Without getting into a jurisdictional battle, we would like to welcome the ramp and stores employees on Capital Airlines who are now covered by a BRC [Brotherhood] agreement into the IAM where the IAM similar employees are covered by an IAM agreement." R. 125.

Subsequent developments in this dispute demonstrate that the IAM has not accomplished this without its jurisdictional battle. Shortly after the district court dismissed Brotherhood's complaint in this case, Brotherhood started a representation proceeding before the N. M. B. seeking to represent the entire clerical craft or class at United.[12]

The IAM is a party to that proceeding before the N. M. B. Although Brotherhood professed to have no quarrel with the IAM before the district court in this proceeding, the tune is somewhat different now.

In a letter to the N. M. B., Brotherhood charged the IAM with "collaborating with the management of United." On its part, the IAM advised the N. M. B. that the Brotherhood was raiding the IAM and threatened to institute

12. This was the subject of subsequent litigation which is now pending before this Court on petitions for certiorari. Nos. 138, 139, 369 (supra, p. 10).

formal proceedings against Brotherhood under the AFL-CIO Constitution. No. 139, J. A. 47, 51.

The Brotherhood complaint here made no exception for the 530 employees who had been under the United-IAM agreement for over four months at the time the complaint was filed.[13] The IAM has stated that it has no intention of giving up its right to represent these employees. R. 125.

In its brief, Brotherhood implies that it is disavowing any claim for representation rights respecting these 530 employees. Pet. Br. 37. It says that it is asserting no rights independent of its own agreement and that it only "seeks to establish rights under that agreement, not to negotiate a new agreement." Pet. Br. 35.

The conflict between Brotherhood's complaint and its argument presents, however, a dilemma it cannot avoid. For if it asks that its contract be applied to all former Capital employees—as it does in its complaint—then the jurisdictional dispute with the IAM is patent. But if it excludes the 530 employees claimed by the IAM, then Brotherhood is in substance renegotiating that agreement by modifying the craft or class it purports to cover. This means that Brotherhood is asserting its prior representation rights to modify the Capital contract and cannot continue to claim that it is merely seeking to enforce that contract. In short, a Brotherhood contract without the ramp and stores employees is a different contract from the one set out in the Brotherhood complaint.[14]

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13. The complaint was filed on November 9, 1961. R. 3. On June 23, 1961, IAM and United executed a Letter of Agreement covering the integration of former Capital employees into the IAM Ramp and Stores Agreement. R. 93. Brotherhood was invited to participate in negotiations leading to this integration but refused. R. 94.

14. This is brought into focus by a situation which could arise under the contract bar rules of the National Labor Relations Board, which permitted an election for a new bargaining repre-

The United States meets the problem head on. It concedes nothing to the position of the IAM. "The question is to what extent the Brotherhood-Capital agreement continues to be applicable to the employment relations between United and the former Capital employees in the period after the merger but before the selection of a representative for the merged unit." U. S. Mem. 9.

Presumably, the United States would leave the problem of the Brotherhood-IAM conflict to an adjustment board, following the lead of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950). U. S. Mem. 15. But the jurisdictional conflict in that case could be referred to the National Railroad Adjustment Board, which was in a position to give

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sentative after the second year of a long-term labor contract. It was possible to have a new bargaining representative elected for a part of the bargaining unit only, while the remaining employees were still represented by the old union, and, presumably, still under the prior unexpired contract. It has been suggested that in this situation the remaining employees might argue the entire contract should terminate, and not merely as to the severed group of employees. The reason advanced is that the negotiation of new terms for the removed employees would disturb intraplant relationships which had previously existed among all classifications under contract, and might require different terms for the remaining employees to retain the balance. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 11 (1958).

The force of this argument is well illustrated by the circumstances here. The clerical craft or class includes a wide variety of job classifications ranging from janitor to auditor and chief accountant. R. 24-29. The ramp and stores employees are not among the highest rated classifications under the craft or class. When these employees became part of the IAM classification upon effectuation of the merger, they received an improvement in wages and working conditions. If the Brotherhood contract were binding for the remaining classifications, these would suffer a relative reduction in benefits vis-a-vis the ramp and stores employees. Other considerations raised in this brief aside, it would be inequitable to permit United to insist that it pay these remaining employees the lower wages and benefits provided under the Capital contract, while paying the ramp and stores employees at the relatively higher levels.

complete relief since as a national board its jurisdiction covered both unions.[15] Although a comparable national board of adjustment is authorized under Title II of the Railway Labor Act for airlines, it has not yet been established. See *I. A. M.* v. *Central Airlines*, 372 U. S. 682, 685-6 (1963). The adjustment board which the United States refers to here was a contractual bipartite board on which Brotherhood, and not the IAM, had representation. R. 32. And the adjustment board under the IAM Ramp and Stores agreement would exclude Brotherhood.[16] R. 79.

Thus the only possible forum for resolution of the underlying representation dispute is the National Mediation

15. There is considerable doubt whether the kind of jurisdictional dispute involved here would in any event be referable to an adjustment board, even one national in scope. The basic conflict between the IAM and Brotherhood arises not out of contract but out of a different historical development of bargaining relationships at Capital and United, reflected in different N.M.B. unit determinations at the two carriers. See supra, pp. 7-8. This kind of conflict can only be ultimately resolved by the N.M.B. *cf. Carey* v. *Westinghouse*, 375 U. S. 261 (1963).

16. The difference between the authority of the National Railroad Adjustment Board and a system adjustment board is illustrated by *Order of Railroad Telegraphers* v. *Union Pacific R.R.*, 231 F. Supp. 33 (D.C. Col., 1964). A dispute between the Telegraphers and Brotherhood arose over the assignment of certain work and the Telegraphers submitted a claim to the National Railroad Adjustment Board that the assignment was a violation of its labor agreement. The Board made Brotherhood a party to the proceeding and ultimately found for the Telegraphers, who instituted this action in the district court to enforce the award. The court granted the carrier's motion to dismiss on the ground that the Brotherhood—which had not been made a party to the court action—was an indispensable party as it had been to the National Railroad Adjustment Board proceeding. The question of the lack of an indispensable party was also raised here in United's motion to dismiss. The district court commented that it felt "constrained to observe that despite its own protestations we fail to see how this action could be consummated without joinder of the International Association of Machinists." In view of the dismissal on jurisdictional grounds, this was dictum, and the district court so noted. R. 128.

Board, and this is where the issue now lies and should properly be concluded.

The United States argues that the pendency of the N. M. B. proceeding demonstrates that the instant case does not involve a representation dispute. U. S. Mem. 8. The N. M. B. proceedings, however, made obvious what was implicit in this action from the beginning. In *Ruby* v. *American Airlines*, 323 F. 2d 248 (C. A. 2, 1963), cert. den. 376 U. S. 913 (1964), the Air Line Pilots Association sought to compel the airline to bargain with it as the designated representative under the doctrine of *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, (1937). About two months after the action was started, another organization petitioned the N. M. B. for representation rights. The district court held there was no jurisdiction and the Court of Appeals affirmed.

> "... [T]he courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." 323 F. 2d 248, 255.

The "inevitable prospect" here was apparent even before Brotherhood started this action. Its campaign to organize the entire group of employees, including those it represented at Capital, started prior to the merger, and it utilized the various proceedings it instituted before the C. A. B., N. M. B., Court of Appeals for the District of Columbia, and this action as part of its organizing campaign by publicizing the proceedings through handbills to all United employees. R. 53, 99. It filed its representation petition with the N. M. B. on August 24, 1962—two weeks after the district court issued its opinion dismissing

the complaint and five days before the entry of its formal order. R. 127, 129. This development was as certain here as it was in the *Ruby* case, and the result here should be no different because Brotherhood petitioned the N. M. B. after, and not before, the district court manifested its intent to dismiss the complaint.

In addition to the jurisdictional dispute arising out of the ramp and stores employees, there is another problem of "who are members of the craft or class," under the Capital agreement which cannot be judicially determined.

The Brotherhood-Capital agreement contained a union security provision which required all employees in the craft or class hired after February 1, 1959, to become and remain members of the Brotherhood as a condition of employment. R. 38-40. From that date to the date of the merger approximately 1,150 employees were hired by Capital who were subject to the union shop provision. R. 102. There is thus no way of knowing who is voluntarily under the Brotherhood agreement and who is not. Under the holding of *International Ladies' Garment Workers' Union* v. *N. L. R. B.*, 366 U. S. 731 (1961), there is considerable doubt whether the Brotherhood may continue to claim contractual rights after it lost its status as majority representative for employees who became members of the Brotherhood under the compulsion of a union security provision in effect when Brotherhood was the sole and exclusive bargaining representative of the entire craft or class at Capital.

These are questions which have not been delegated to the judiciary for resolution. "Congress * * * chose not to leave their solution to the courts." *General Committee* v. *M.-K.-T.*, 320 U. S. 323, 336 (1943).

B. There Is No Federal Jurisdiction Because of the Minority Status of Brotherhood.

The Brotherhood represented 2700 employees at Capital. The comparable group at United totaled 10,000. After the merger the groups were completely integrated, and Brotherhood asserts rights on behalf of a group which is now a minority.

The same situation prevailed at the Wiley publishing firm after the Interscience merger. In *Wiley*, it was held that the Interscience union's minority status at Wiley did not prevent it from representing the employees under the Interscience contract under which Wiley's duty to arbitrate arose. 376 U. S. at 551 n. 5.

Wiley was a suit to enforce arbitration under Section 301 of the Labor Management Relations Act. The action here arises under the Railway Labor Act, and Section 301 is not applicable. There is no equivalent provision in the Railway Labor Act. *International Association of Machinists* v. *Eastern Airlines*, 320 F. 2d 451, 455 (C. A. 5, 1963); *Bruno* v. *Northeast Airlines*, 229 F. Supp. 716 (D. C. Mass., 1964). Hence, Brotherhood's conclusion that *Wiley* settles the minority status question in this case (Pet. Br. 20, 35-36) is hardly warranted. Examination of the authorities compels precisely the contrary inference.

Wiley relied on *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17 (1962), in support of the holding that a minority union could bring a Section 301 action under the Labor Management Relations Act. In *Lion Dry Goods* the Court concluded that the phrase "labor organization representing employees" in Section 301(a) of the LMRA did not mean exclusive bargaining representative. "Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining

agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a)." 369 U. S. at 29. Section 9(a) of the NLRA provides for the selection of exclusive bargaining representatives by the majority of employees in an appropriate unit, and is the analogue of Section 2, Ninth, of the Railway Labor Act. *N. L. R. B.* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937).

The Court also added in *Lion Dry Goods*, in support of its conclusion that minority unions could proceed under Section 301(a) of the LMRA, that Section 8(f), added by the 1959 amendments to the Act, "contemplates contracting with unions that would not represent a majority." 369 U. S. at 29.

But Section 204 of the Railway Labor Act—under which the United States says federal jurisdiction would "seem to exist" in this case (U. S. Mem. 6 n.2), and under which it suggests United should be required to arbitrate with Brotherhood (U. S. Mem. 11-12)—has been limited by Congress in precisely the manner which the Court said in *Lion Dry Goods* would indicate a Congressional intent to exclude minority unions from the purview of federal jurisdiction.

Section 204 provides:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, *selected in accordance with the provisions of this title*, to establish a board of adjustment . . ." (Emphasis added.)

Representatives "selected in accordance with the provisions of this title" can only be the representatives selected by the majority of the craft or class, under Section 2, Fourth and Ninth of the Act, for these are the only provisions in the Railway Labor Act for the selection of representatives.

Comparable language restricting the meaning of "representatives" to the majority representatives is found in other sections of the Railway Labor Act. Section 2, Eleventh, which authorizes union shops, refers to "representatives duly designated and authorized to represent employees in accordance with the requirements of this Act." Section 3, Second, authorizes railroads and "representatives selected in accordance with the provisions of this Act" to establish carrier, system or group adjustment boards.

This difference between the two statutes is not a legislative oversight. In 1934 the Railway Labor Act was substantially amended. The right of employees to organize and bargain collectively was clarified. The National Railroad Adjustment Board and National Mediation Boards were created. The disputes settlement machinery of Section 2, Ninth was added. 48 Stat. 1185.

The draftman of the 1934 amendments was Joseph B. Eastman, Federal Coordinator of Transportation, and he testified extensively at Congressional hearings on the proposed legislation. His comments on the amendments have been accepted as authoritative by this Court. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302-3 (1943).

During the hearings, railroad spokesmen suggested amendments to Commissioner Eastman's draft, which would have, in his opinion, provided for recognition of minority unions. Commissioner Eastman vigorously objected:

> ". . . Recently the idea has emerged, and apparently it is the idea behind these railroad amendments, that organizations representing the minority as well as the majority ought to be recognized. In any class or craft, therefore, part of the employees might be represented by a national union, if this idea prevailed, part by a

company union and still another part by a communist organization.

" . . . Any class or craft of employees cannot deal effectively in parts with an employer. Our Civil War was fought over a similar issue, and I see no good reason for encouraging the theory of secession in labor organization. If the majority of the employees want to have a company union, that ought to be the representative organization, and I do not favor compelling the company to deal also with a national union representing a minority. The same principle applies when the situation is reversed." Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73d Cong. 2d Sess., p. 146.

The suggested amendments were not adopted.

The constitutionality of the new amendments was sustained in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). In discussing the "limited duties" imposed on the carrier by the provisions of the amended Section 2, the Court stated these provisions "impose on petitioner [railroad] only the affirmative duty of 'treating with' the authorized representatives of its employees for the purpose of negotiating a labor dispute." 300 U. S. at 557.

In commenting on the duty of a carrier once a representative had been selected, the Court stated:

"The obligation imposed on the employer by § 2, Ninth to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" 300 U. S. at 548. (Emphasis added.)

The Court quoted in a footnote, with apparent approval, a note in the brief of the United States, which intervened as

amicus, to the effect that once a majority representative had been selected "the carrier cannot make with anyone other than the representative a collective contract • • • whether the contract covers the class as a whole or a part thereof." However, if a majority representative had not been selected, then the carrier "is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions." 390 U. S. at 548-49 n.6.

Thus the Court held that the compulsion of the amended Railway Labor Act for a carrier to bargain with or contract with a labor organization extended only to the majority representative, and that when such a representative was selected, the carrier could contract with no other. When no representative had been selected, the carrier could voluntarily contract with anyone for any group—but this could not be compelled under the Act.

When Brotherhood lost its majority status on the consummation of the United-Capital merger it lost its status as a representative under the Railway Labor Act. It cannot now maintain a federal action absent diversity to enforce a contract which no longer has status under the Railway Labor Act.

The action cannot be saved—as the amicus tries—by basing federal jurisdiction on Section 204 of the Act and changing the nature of the relief sought, since that section also is applicable only to adjustment boards established with majority representatives.[17] Here federal jurisdiction has been limited "to suits on contracts with exclusive bargaining agents." *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17, 29 (1962).

17. In *I.A.M.* v. *Central Airlines*, 372 U. S. 682 (1963), the I.A.M. was the certified bargaining agent for the craft or class—hence the requirements of Section 204 were met. Thus that case did not reach the point raised here. Cf. Pet. Br. 29-30.

C. The Contract Question Should Have Been Left With the Court of Appeals for the District of Columbia.

There is a separate and independent reason for affirming the dismissal of the complaint.

It may be an interesting exercise in legal conceptualism to treat this case as a simple contract question, or as a matter of Delaware corporation law, or as a problem in statutory construction in comparing Section 301 of the Labor Management Relations Act with Section 204 of the Railway Labor Act. But the case is really about the United-Capital merger. The issue of the survival of the Brotherhood-Capital labor agreement cannot be realistically isolated from the host of economic and legal issues which surrounded the merger of United and Capital. The impact of alternatives on Capital's employees was an obvious factor in the decision of the C. A. B. to approve the merger. United's assurances that all Capital employees would be offered employment with United on terms equal or superior to those they enjoyed at Capital certainly was a material consideration in the C. A. B. determination.

Equally significant was the finding that the integration of operations and employees at the 12 points in common to both airlines would result in an annual savings in excess of Capital's deficit in the year preceding the merger hearings. For if United was bound to assume this agreement, it might not have been able to consolidate employees at the overlapping stations. It certainly could not have assured the C. A. B. that Capital employees would receive an improvement in wages and benefits upon the effectuation of the merger, for then it would have been required to apply the lesser benefits of the Brotherhood contract. It is possible that if it proceeded at all it could only operate Capital as a separate system until the Brotherhood contract could be terminated in February 1962—the experience

of other airlines in similar circumstances. R. 126. The savings which the C. A. B. anticipated as a result of consolidation of operations might not have been realized.

This is not to say that the issue of the existing bargaining relationships at Capital was not a factor appropriate for the C. A. B. in passing upon the merger. Other unions also had problems: The Communications Workers were concerned that United might contract out work formerly done by Capital (33 C. A. B. at 389); the Flight Engineers were concerned about protecting their contractual right to move into pilot jobs (33 C. A. B. at 390). But all these issues were part of a larger whole, and the only forum in which they could be fully aired was the C. A. B.

We are aware that counsel for the C. A. B. stated to the Court of Appeals for the District of Columbia in response to Brotherhood's motion to stay the order approving the merger that the C. A. B. did not "purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement." R. 49-50.

But although the C. A. B. may not have passed on that issue directly, the inevitable consequence of its direction to United that notice be given to employees "who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement" (33 C. A. B. at 331) was that these employees did lose their collective bargaining agreement when United posted such a notice. Brotherhood knew this and it immediately petitioned the C. A. B. to reconsider once the notice was posted (*supra*, p. 6).

Indeed, Brotherhood raised all these questions before the Court of Appeals for the District of Columbia on its petition to review the C. A. B. order. There is no doubt that that Court could have considered every issue raised in this

litigation. But it would have done so on the entire record before the C. A. B. and not in isolation.

The action of the Brotherhood here is in reality a collateral attack on the C.A.B. order approving the merger. Under the Federal Aviation Act, the procedure for review of that order was that initially followed by Brotherhood: to petition the Court of Appeals, which had "exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator." Section 1006(a), (d), 49 U. S. C. § 1486. See *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (Ga., 1962).[18]

The Court of Appeals decision upholding the United-Capital merger on petition of other airlines was handed down on January 25, 1962. 303 F. 2d 395 (C. A. D. C., 1962). But by then Brotherhood was long gone, having withdrawn its petition in November, so that it could start this litigation three days later.

By now the labor protective provisions have run their course, the protected period having expired on June 1, 1964. The employees have been enjoying the higher wages, longer vacations and other benefits for over three years without complaint. Had the Court of Appeals held United bound to the Brotherhood agreement, the agreement could have been cancelled in February, 1962.

The decision of the Court below should be upheld for the reason—among the others here set forth—that Brother-

18. This was a suit by a group of employees to restrain the airline and union from putting into effect a collective bargaining agreement which adversely affected their employment relationship. The agreement was the outgrowth of proceedings before the C.A.B. The court held that the action was in substance a challenge of C.A.B. orders, and that exclusive jurisdiction to review the orders was with the Court of Appeals. Cf. *Southern Pilots Association* v. *C.A.B.*, 323 F.2d 288 (C.A.D.C., 1963), cert. den. 376 U.S. 954 (1964).

hood abandoned its claim when it withdrew its petition from the Court of Appeals for the District of Columbia. The Brotherhood has taken advantage of the privilege of litigation for its own purposes—certainly not for the interest of the former Capital employees who only gained by the "loss of collective bargaining agreement" which the Brotherhood here seeks to impose on them and United.

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Federal Aviation Act—

Section 408(b), 49 U. S. C. § 1378(b):

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe. . . ."

Railway Labor Act—

Section 2, Eleventh, 64 Stat. 1238, 45 U. S. C. § 152, Eleventh:

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days fol-

lowing the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner. . . ."

Labor-Management Relations Act—

Section 9(a), 61 Stat. 143, 29 U. S. C. § 159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of of employment, or other conditions of employment:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Section 301(a), 61 Stat. 156, 29 U. S. C. § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."